No. 18-1048

IN THE

Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., A FOREIGN CORPORATION FORMERLY KNOWN AS CONVERTEAM SAS,

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber repre-

[1] No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

sents approximately 300,000 direct members and indirectly represents an underlying membership of more than 3 million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress and the Executive Branch.

To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g., Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

International arbitration is especially important to the Chamber's members. As global trade has expanded, American companies increasingly rely on international arbitration to resolve complex commercial disputes. The sophisticated legal framework governing the enforcement of international arbitration agreements and arbitral awards provides essential assurance that those companies' commercial interests will be safeguarded. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") represents an essential keystone in this legal framework. Whereas the United States is not a party to any bilateral or multilateral treaty governing the enforcement of foreign judgments, 160 countries, including the United States and virtually all of the world's major trading nations, have acceded to the New York Convention. *See* G. Born & P. Rutledge, *International Civil Litigation in United States Courts* 1070, 1153 (6th ed. 2018); 1 G. Born, *International Commercial Arbitration* § 1.04[a][1][b] at 104 (2d ed. 2014).

The Chamber thus has a strong interest in the law governing arbitration, including the proper construction of the New York Convention and the Federal Arbitration Act ("FAA").

INTRODUCTION

This case concerns the identity of parties that can enforce international arbitration agreements. Historically, such agreements, whether foreign or domestic, were unenforceable in the United States because they attempted to oust courts of jurisdiction and, consequently, were contrary to public policy. *See* 1 Born, *International Commercial Arbitration*, § 1.01[B][5] at 46-50. Similar sentiments prevailed in England and some civil-law systems like France. *See id.* § 1.01[B][3]-[5] at 35-46.

Over the course of the twentieth century, as international and interstate commerce expanded, nations including the United States adapted their legal rules governing arbitration. In the United States, the FAA's enactment in 1925 represented an important milestone. *See* 9 U.S.C. §§ 1-16. *See generally* 1 Born, *International Commercial Arbitration* § 1.04[B][1] at 128-34. A key purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Countries also entered into bilateral treaties to facilitate commerce. Such treaties, sometimes referred to as Friendship Commerce and Navigation ("FCN") treaties, often required signatory countries to recognize arbitration clauses contained in contracts between companies from their respective states. *See* L. Quigley, *Accession by the United States to the United Nations*

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1051-54 (1961). For example, the FCN treaty between the United States and the Republic of Ireland provided that "[c]ontracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party." Treaty of Friendship, Commerce and Navigation Between the United States of America and Ireland, 1 U.S.T. 785, art. X (1950).

Beyond these national reforms and bilateral undertakings, many of the world's major trading nations also developed a multilateral treaty framework. That framework governed the enforceability of both international commercial arbitration agreements and awards. Its foundations included the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Though no longer effective today, these two treaties supply the essential backdrop against which the New York Convention, central to this case, was developed.

The Geneva Protocol governed the enforcement of international commercial arbitration agreements. It obligated signatory states to "recognise[] the validity" of arbitration agreements relating to commercial matters between parties of different contracting states irrespective of arbitral forum. Protocol on Arbitration Clauses in Commercial Matters art. 1, Sept. 24, 1923, 27 L.N.T.S. 158 (1923) ("Geneva Protocol"). It also

required the courts of those states "seized of a dispute" regarding a contract containing a "valid" arbitration agreement to "refer" the parties to arbitration unless it found that the arbitration "cannot proceed" or that the agreement had "become[] inoperative." *Id.* art. 4.

The Geneva Convention governed the enforcement of international commercial arbitral awards. The Convention generally obligated signatory states to "recognise[] as binding" and to "enforce" foreign awards rendered by a tribunal sitting in another state that was party to the convention. Convention on the Execution of Foreign Arbitral Awards art. 1, Sept. 26, 1927, 92 L.N.T.S. 301 (1929) ("Geneva Convention"). It also contained various defenses to enforcement, including where the arbitration agreement was not "valid under the law applicable thereto." *Id.* art. 1(a).

Although both the Geneva Protocol and the Geneva Convention signified milestones in the development of a multilateral legal framework governing arbitration, they did not produce "the widespread international enforcement of arbitration agreements and awards which was expected of them." Quigley, 70 Yale L.J. at 1055. The United States did not ratify either treaty. 1 Born, *International Commercial Arbitration* § 1.01[C][1] at 65. Moreover, both treaties contained several structural shortcomings. For example, while the Geneva Protocol generally obligated signatory states to enforce international commercial arbitration agreements, it provided no guidance regarding subjects such as when an agreement was "valid" or "inoperative," effectively leaving the matter to national courts. Geneva Protocol art. 1. Similarly, although the Geneva Convention generally obligated signatory states to enforce international commercial arbitral awards, it first required the prevailing party to obtain judicial confirmation of the

award in the state where the arbitration took place before it could seek enforcement elsewhere, again tying enforceability questions to national law. *See* Geneva Convention art. I(d). Bifurcation of the issues governing a single arbitration—with one treaty principally governing arbitration agreements and another treaty principally governing arbitral awards—presented additional challenges.

Completed in 1958, the New York Convention represented the culmination of a multi-year, multilateral effort to overcome some of these shortcomings. Evidencing the close connection between these treaties, the New York Convention explicitly provides that the two Geneva treaties "shall cease to have effect between Contracting States on their becoming bound, and to the extent they become bound, by this Convention." New York Convention art. VII (2).

Much of the New York Convention addresses the enforceability of international commercial arbitral awards, the subject previously regulated by the 1927 Geneva Convention. This is unsurprising for, as explained below (*infra* at 17), the provisions regulating arbitration agreements only were added very late in the drafting process.

Article II of the New York Convention supplies the primary provision governing the enforcement of international commercial arbitration agreements, the subject previously regulated by the 1923 Geneva Protocol. That article contains three sections. Section 1, much like Article I of the Geneva Protocol, imposes an affirmative obligation on Contracting States to recognize arbitration agreements:

> Each Contracting State shall recognize an agreement in writing under which the parties

> undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Section 2 defines the term "agreement in writing," used in Section 1:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Section 3, much like Article IV of the Geneva Protocol, imposes an affirmative obligation on courts to refer actions to arbitration:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The court below read these provisions, in particular Article II (2), strictly to limit the identity of the parties that may request a court to refer a dispute to arbitration in a case arising under the New York Convention. In the lower court's view, the New York Convention only allows a court to refer a dispute to arbitration when the contract containing the arbitration clause is "signed by the parties before the Court or their privities." Pet. App. 16a (footnote omitted).

ARGUMENT

Amicus agrees with Petitioner that the lower court's decision should be reversed. *Amicus* writes separately to explain why, with special reference to its historical backdrop and the post-ratification understanding of other signatory states, the New York Convention does not displace doctrines permitting parties, other than those that have formally signed the contract containing the arbitration clause, from enforcing the clause where the applicable law so allows.

I. Chapter 1 of the Federal Arbitration Act permits a non-signatory to enforce an arbitration agreement against a signatory if the applicable law so allows.

Title 9 of the United States Code contains three chapters. Chapter 1 supplies general provisions governing domestic arbitrations and, under certain circumstances, international arbitrations. *See* 9 U.S.C. §§ 1-16. Chapter 2 contains the implementing legislation for the New York Convention. *See* 9 U.S.C. §§ 201-08. Chapter 3 contains the implementing legislation for the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). *See* 9 U.S.C. §§ 301-07.

Two key provisions of Chapter 1 help to overcome the above-described historical opposition to the enforcement of arbitration agreements. Section 2 requires courts to enforce those agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 entitles litigants to a stay in federal court of an action that is subject to an arbitration agreement falling under Section 2. *Id.* § 3.

Collectively, these sections place arbitration agreements on the "same footing as other contracts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *Volt Info. Scis., Inc. v. Board of Trust. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). This equal-footing principle requires courts to apply doctrines governing the enforcement of certain third-party contractual rights. *Carlisle*, 556 U.S. at 630-31. These doctrines include "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and *estoppel*." *Id.* at 631 (quoting 21 R. Lord, *Williston on Contracts* § 57:19 at 183 (4th ed. 2001)) (emphasis added).

In *Carlisle*, a set of defendants (who were not signatories to contracts containing arbitration clauses) invoked one such doctrine—estoppel—to argue that plaintiffs (who had signed the contracts) were required to resolve their claims in arbitration. This Court agreed with the defendants and held that "a litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement." 556 U.S. at 632.

Under *Carlisle*, then, the answer to the question presented in this case is clear under Chapter 1. Here, just like in *Carlisle*, a defendant that has not signed the contract containing the arbitration clause invokes the estoppel doctrine to enforce that clause against a plaintiff-signatory. *Carlisle* makes plain that, in Chapter 1 cases, the FAA permits a defendant to do so (and does not categorically limit the enforcement of the arbitration agreement to its signatories) provided that the applicable law so allows. The only remaining question is whether the FAA requires a different rule when the case has an international dimension.

Until the United States acceded to the New York Convention, the answer unequivocally was "no." Before that time, the United States was not a party to a multilateral treaty governing the enforcement of international commercial arbitration agreements or arbitral awards.[2] Consequently, between 1925 (the year of the FAA's enactment) and 1970 (the year the United States deposited its notice of ratification), courts in the United States routinely applied Chapter 1 to decide whether to enforce international arbitration agreements, including in cases involving parties that had not signed the underlying contract containing the arbitration clause.[3] *See, e.g.*, *Fisser v. International Bank*, 282 F.2d 231 (2d Cir. 1960); *Application of Reconstruction Fin. Corp.*, 106 F. Supp. 358 (S.D.N.Y. 1952). *See generally* Restatement U.S. Law of Int'l Comm. and Investor-State Arb. § 2-3 Reporters' Note a (2019) ("Courts have long held, however, that a party may be bound even in the absence of formal assent, whether by signing the arbitration agreement or otherwise.").

The Second Circuit's decision in *Fisser* illustrates the point. *Fisser* involved a charter party between a

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[2] In addition to the above-described bilateral Friendship Commerce and Navigation treaties, *see supra* at 3-4, the United States had already ratified the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 U.N.T.S. 159 (1965).

[3] This is unsurprising. Section 2 establishes the validity of a written provision "in any maritime transaction or a contract evidencing a transaction involving commerce," which are broadly defined to include foreign commercial transactions. *See* 9 U.S.C. § 1. *See generally Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 55-58 (2003) (*per curiam*); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995); *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

German coal importer and a Liberian shipping company. The charter party provided for arbitration in New York City. A dispute arose over whether a third-party bank, allegedly the *alter ego* of the Liberian shipper (that had not signed the agreement), could be compelled to arbitrate its liability arising from the shipper's non-performance of its duties under the charter party. Applying Chapter 1 of the FAA to this international dispute, the Second Circuit held that the bank could be required to arbitrate and cited "a long series of decisions which recognize that *the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law*." *Fisser*, 282 F.2d at 233 (footnote omitted) (emphasis added). *Fisser* demonstrates that, historically, federal courts did not apply different principles governing third-party enforcement of arbitration agreements merely because the dispute happened to be an international one.

Even after the United States ratified the New York Convention (and the Panama Convention), Chapter 1 still supplies the sole standards governing some international arbitrations. As this Court recognized in *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, international arbitrations occasionally arise that are "not covered by either convention." 529 U.S. 193, 203 (2000). Often, these cases involve arbitrations taking place in a country that has not signed the New York Convention or the Panama Convention. In such cases, the reciprocity reservations deposited by the United States preclude application of either treaty to enforce an agreement or an award. *See, e.g.*, New York Convention art. I(3) (reciprocity reservation); *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987). Under these circumstances, *Cortez Byrd*

Chips made clear, Chapter 1 governs the dispute. 529 U.S. at 197.

The Eleventh Circuit, however, held that the New York Convention requires a different result in Chapter 2 cases, like this one. It interpreted Article II of that Convention to displace the *Carlisle* doctrine and, instead, to impose an inflexible straitjacket on the enforceability of such clauses, categorically commanding "that the arbitration agreement be signed by the parties before the Court or their privities." Pet. App. 16a (footnote omitted).

This crabbed construction subverts the Convention. Far from inhibiting international commercial arbitration agreements, a central purpose of the New York Convention was to *enhance* their enforceability, as this Court has repeatedly recognized in a series of decisions inexplicably ignored by the court below. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). *See also* Born & Rutledge, *International Civil Litigation in United States Courts* at 1159 ("A primary objective of the New York Convention was to render international arbitration agreements valid and enforceable.") (footnote omitted). Ironically, then, the lower court's rule renders agreements, falling under a convention specifically designed to enhance their enforceability, less effective than other agreements falling outside that treaty's scope. Faithful application of this Court's trusted interpretive tools reveals that nothing in the New York Convention or its implementing legislation supports the lower court's categorical (and erroneous) conclusion.

II. Nothing in the New York Convention or its implementing legislation conflicts with application of the *Carlisle* doctrine.

Section 208 of the Federal Arbitration Act supplies the starting point for the analysis: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. As the Eleventh Circuit correctly held, this case is a "proceeding" brought under Chapter 2. *See* Pet. App. 8a-13a. Thus, the *Carlisle* doctrine, rooted in Chapter 1, applies to this "proceeding" unless it is "in conflict" with the Convention or its implementing legislation. It was on this point of law that the lower court erred. Contrary to its conclusion, Pet. App. 17a, the *Carlisle* doctrine does not conflict with either the treaty or Chapter 2.

A. The *Carlisle* doctrine is not "in conflict" with the New York Convention.

1. The text of Article II does not preclude the application of the *Carlisle* doctrine.

Nothing in Article II expressly precludes countries from applying their national doctrines governing the participation of non-signatories. In light of this textual silence, *amicus* agrees with Petitioner (Br. 51-52) that the New York Convention simply does not displace national rules governing the issue. *See* A. Scalia & B. A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("[A] matter not covered is to be treated as not covered."). Elsewhere, this Court has explained that where a statute or rule is silent, the background rule or law governs. *See* *Marx v. Gen. Revenue Corp*., 568 U.S. 371, 380 (2013);

New Jersey v. New York, 523 U.S. 767, 783 n.6 (1998); *id.* at 813 (Breyer, J., concurring); *O'Melveny* & *Myers v. FDIC*, 512 U.S. 79, 85 (1994). Here, that background rule is the one denominated above (prevailing for nearly a half century before the New York Convention's ratification and continuing to govern non-Convention international arbirations governed exclusively by Chapter 1 of the FAA): Doctrines allowing the participation of non-signatories, including estoppel, are available when the applicable law so allows.

To conclude otherwise, the court below read Article II (2) to impose an inflexible form requirement on arbitration agreements falling under the Convention—insisting that *any* agreement be "in writing" and "signed by the parties or their privities." This rule effectively precluded any application of the *Carlisle* doctrine because the categories of parties envisioned in *Carlisle* (and earlier, pre-Convention decisions like *Fisser*) necessarily have not "signed" a "written" agreement. Although the lower court correctly commenced its analysis with the Convention's text, *see Medellin v. Texas*, 552 U.S. 491, 506-07 (2008) (citations omitted), its central error was to construe Article II (2) to set forth an exhaustive, as opposed to an exemplary, definition.

As noted in the Introduction, Article II (2) provides that an agreement in writing "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." New York Convention art. II (2). In other contexts, this Court has consistently interpreted the term "include" to be exemplary, not exhaustive. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 146 (2012); *Burgess v. United States*, 553 U.S. 124, 131, n.3 (2008); *Groman v.*

Comm'r of Internal Revenue, 302 U.S. 82, 86 (1937). *Burgess* explained that the term "includes" is generally meant to be a term of enlargement, not limitation. *Burgess* contrasted the term "includes" with "means," explaining that this latter term more often represents an exhaustive definition. *Burgess*, 553 U.S. at 131 n.3.; *see also Christopher*, 567 U.S. at 146.

Whereas *Burgess* arose in the context of a federal statute, its construction of the term applies equally in the context of a treaty. Elsewhere, this Court has explained that "[o]ther general rules of construction" may be used to aid in treaty interpretation. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988)). Thus, the general rule of construction treating "includes" as a term of enlargement, not limitation, can inform the interpretation of Article II.

Some commentators have seized upon the phrasing of Article II (2) in other "equally authentic" languages to support a more rigid reading. *See* New York Convention art. XVI (noting that the treaty is equally authentic in English, French, Spanish, Chinese and Russian). Specifically, this argument relies upon the French version of Article II (2) to indicate that the relevant term in the provision should be understood as "means" rather than "includes" and, thus, establishes a minimum form for enforceable agreements.[4] *See* A. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 178-79 (1981) ("*Uniform Interpretation*").

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[4] The relevant language in the French version reads "[o]n entend par convention écrite."

This view is flawed. For one thing, French courts do not share it. Instead, as explained below, French courts have not interpreted Article II so rigidly but, instead, employ a commercially flexible approach allowing the participation of non-signatories in an international commercial arbitration under certain circumstances. *See infra* at 27. For another thing, tensions between two "equally authentic" versions of the treaty text do not resolve an interpretive question but demonstrate simply that this may be a case where "[e]nlightenment will not come merely from parsing the language." *Cortez Byrd Chips*, 529 U.S. at 198. Instead, it requires resorting to other interpretive tools on which this Court has relied to construe treaties. Those interpretive tools all point to a more flexible, commercially reasonable interpretation of Article II, consistent with this Court's customary interpretation of the term "includes."

2. The drafting history demonstrates that the Convention was not meant to limit international arbitrations to the parties that have formally signed the contract containing the arbitration clause.

The *travaux preparatoires* (*i.e.*, drafting history) routinely informs this Court's interpretation of a treaty. *See Medellin*, 552 U.S. at 506-07; *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 226 (1996); *United States v. Stuart*, 489 U.S. 353, 365-66 (1989); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). In this case, the New York Convention's history demonstrates that its drafters did not intend to displace national laws governing the identity of the parties that may enforce an agreement.

Much of the Convention's drafting history concerns the provisions governing the enforcement of arbitral awards, not agreements. In 1954, the United Nations Economic and Social Council charged an eight-nation committee (not including the United States) to study a proposal by the International Chamber of Commerce for a new international convention specifically governing the enforcement of international arbitral awards. *See* Quigley, 70 Yale L.J., at 1059. During the early stages of the committee's work, Sweden proposed that the draft convention also address the enforcement of arbitration agreements, but the committee declined to adopt Sweden's proposal. Rep. of the Comm. on the Enf't of Int'l Arbitral Awards on its Nineteenth Session, item 14, ECOSOC, U.N. Doc. E/AC.41/4/Rev.1, at 6 (Mar. 28, 1955). Consequently, over the succeeding years, work on the draft convention largely centered on a framework governing arbitral awards, not arbitration agreements.

The prospect of regulating arbitration agreements reemerged during a three-week conference of delegates from forty-five nations (including the United States) that took place at the United Nations during May and June of 1958. *See* G.W. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference (May / June 1958)* 21-23 (1958) ("*Summary*"). Near the beginning of that three-week conference, Sweden, this time joined by Poland, again proposed consideration of an article requiring signatory states to recognize arbitration agreements. *Id.* at 22. Sweden's version read simply that every contracting state "shall recognize as valid any agreement in writing, concerning existing or future disputes, under which the parties agree to submit to arbitration all or some disputes as may arise between them on any matter

susceptible of arbitration." U.N. Conference on Int'l Commercial Arbitration, *Consideration of the Draft Convention on the Recognition and Enf't of Foreign Arbitral Awards: Sweden Amendment to the Draft Convention*, U.N. Doc. E/Conf.26/L.8 (May 22, 1958). Poland's proposal was modeled on the Geneva Protocol of 1923. U.N. Conference on Int'l Commercial Arbitration, *Summary Record at the Ninth Meeting*, at 2-3, U.N. Doc. E/Conf.26/SR.9 (Sept. 12, 1958) ("*Ninth Meeting*"). This early debate on the Swedish and Polish proposals centered around questions such as whether to embed these matters in a separate protocol and whether it was even appropriate to address them in a convention principally concerned with the enforcement of arbitral awards. Haight, *Summary*, at 22. Nonetheless, in two respects, the Conference records help to shed light on the interpretive question before the Court.

First, some delegates' comments expressly indicate that they did not intend to impose rigid requirements governing arbitration agreements. *See* UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 64 (Emmanuel Gaillard & George Bermann eds., 2017) ("The drafters of the New York Convention sought to adopt a flexible 'in-writing' requirement in order to reflect business reality.") (footnote omitted). For example, the French delegate, commenting on the Swedish proposal, doubted whether the treaty needed to reference that an arbitration agreement could be in writing and noted that, "[t]he entire question on whether such agreement had to be executed in writing or could also be proved by other evidence was one of the greatest complexity." U.N. Conference on Int'l Commercial Arbitration, *Summary Record of the Seventh Meeting*, at 11, U.N. Doc. E/Conf.26/SR.7 (Sept. 12,

1958) ("*Seventh Meeting*"); *see also id.* at 10-11 (comments from El Salvador and Turkey delegations noting that arbitration agreements were contracts and, thus, subject to "complex and varied" rules governing their validity and enforceability); *Ninth Meeting,* at 4 (noting the Turkey delegate's criticism of the Swedish proposal as trying to establish a "uniform law" and that the text of any amendment would have to be limited). Similarly, the German delegate, commenting on the Polish proposal, noted that any definition of writing did not mean a "requirement of writing in the strict sense . . . . [for] [s]uch a requirement would be at variance with the needs and usages of international trade." *Ninth Meeting*, at 3.

Second, other comments suggest that the Convention's broader purpose was to overcome some barriers to international arbitration and to promote that form of dispute resolution as an essential tool in international trade and commerce. For example, the Italian delegate observed that the Convention was "designed to prevent a Contracting State from impeding arbitration." *Seventh Meeting*, at 9; *see also Ninth Meeting*, at 3 (summarizing comments of German delegate that Polish and Swedish proposals "had the great advantage, however, of seeking to preclude recourse to courts of law"). Similarly, the Polish delegate observed that its proposal would "make international transactions more secure" and "prevent commercial companies from evading arbitrations to which they had agreed." *Ninth Meeting*, at 2-3.

On May 26, following extensive debate on the Swedish and Polish proposals, the conference delegates reconsidered the view taken in 1955, *see supra*, at 17, and concluded that the regulation of arbitration agreements fell within their mandate. *See*

Ninth Meeting, at 12; Haight, *Summary*, at 23. They declined to regulate the topic directly in the text of the draft convention at that time but, instead, referred it to a Working Party to develop a separate protocol. *See Ninth Meeting*, at 14; Haight, *Summary*, at 23-24.

On June 5, the Working Party introduced its report. Like the Swedish and Polish proposals, the Working Party report proposed to regulate arbitration agreements. Unlike those proposals, it recommended doing so in a separate protocol. In response, the delegate from the Netherlands proposed an amendment to the Working Party's draft that, like the original Swedish proposal, sought to regulate the enforceability of arbitration agreements directly in a single article in the convention (Article II). Conference delegates reconsidered the matter and decided, as Sweden, Poland and the Netherlands had proposed, to regulate arbitration agreements directly in Article II of the Convention. *See* Haight, *Summary*, at 24.

The final version of Article II reflected an amalgam of the Working Party's report and the Netherlands proposal, both informed by the earlier proposals from Sweden and Poland. Apart from the general sentiments about not imposing a rigid form and promoting international arbitration and commerce, these final drafting moments reveal one other critical feature: The Working Party report proposed the following definition of agreement in writing: "*shall mean* an arbitration agreement or an arbitral clause in a contract signed by the parties, or an exchange of letters or telegrams by those parties." U.N. Conference on Int'l Commercial Arbitration, *Consideration of the Draft Convention on the Recognition and Enf't of Foreign Arbitral Awards: Text of Additional Protocol on the Validity of Arbitration Agreements Submitted*

by Working Party No. 2, ¶2, U.N. Doc. E/Conf.26/L.52 (June 5, 1958) (emphasis added). The final version adopted by the delegates, however, utilized the term "include" from the Dutch proposal and, instead, provided: "The term 'agreement in writing' *shall include* an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams." U.N. Conference on Int'l Commercial Arbitration, *Text of Convention on the Recognition and Enf't of Foreign Arbitral Awards as Provisionally Approved by the Drafting Committee on 6 June 1958*, at 2, U.N. Doc. E/Conf.26/L.61 (emphasis added). This shift from the more exhaustive term "shall mean" to the more illustrative term "shall include" aligns the final wording of the New York Convention with this Court's customary jurisprudence governing the interpretation of like terms in federal statutes or rules, *see supra* at 14-15.

Thus, the Convention's drafting history contains no indication that the delegates intended to displace prevailing national doctrines governing the participation of non-signatories. Rather, that history shows that, to the extent the delegates considered the issue of arbitration agreements, their primary concerns were to address shortcomings in the Geneva Protocol, to promote the enforcement of such agreements, and thereby to facilitate international commercial relationships.

3. The New York Convention's commercially flexible purpose does not support the lower court's rigid rule.

This Court regularly considers a treaty's underlying purposes to inform its interpretation. *See, e.g., Abbott v. Abbott*, 560 U.S. 1, 20-21 (2010). As this Court has repeatedly recognized, a key purpose of the New York Convention was to "promot[e] the process of inter-

national commercial arbitration." *Soler*, 473 U.S. at 639 n.21. *See also Scherk*, 417 U.S. at 520 n.15. International arbitration addresses the growing needs of international commerce and, in contrast to domestic systems of civil litigation, can be more responsive to controversies that "have increased in diversity as well as in complexity." *Soler*, 473 U.S. at 638.

Consistent with this Court's assessment, companies use a diverse array of complex commercial instruments in their international dealings. For instance, in the international shipping industry, companies may use bills of lading that reference an arbitration clause in a sales contract. *See* R. Force & A. J. Mavronicolas, *Two Models of Maritime Dispute Resolution: Litigation and Arbitration*, 65 Tul. L. Rev. 1461, 1464 (1991). In complex international construction arrangements, companies employ a series of contracts governing the project where different contracts may incorporate dispute resolution provisions by reference to general terms and conditions. *See generally* J. Hinchey & T. Harris, *International Construction Arbitration Handbook* (2019). In certain industries, companies utilize electronic transmissions to effectuate their sales. *See* R. Wolff, *The UN Convention on the Use of Electronic Communications in International Contracts: An Overlooked Remedy for Outdated Form Provisions under the New York Convention?*, *in* 60 Years of the New York Convention: Key Issues and Future Challenges (K. Gomez & A. Rodriguez eds. 2019), § 7.04[A] at 118. The enforceability of the arbitration clauses in such arrangements is especially important to American businesses because the United States, unlike much of the rest of the world, has not ratified a multi-lateral (or bilateral) treaty governing the recognition and enforcement of foreign judgments. *See* Born & Rutledge, *International Civil Litigation*

in United States Courts, at 1070 (footnote omitted). Consequently, robust enforcement of international commercial arbitration clauses governing these "diverse" and "complex" arrangements is essential to promote foreign commerce in the United States.

The lower court's decision jeopardizes these practices and undermines the Convention's purposes. None of the dispute resolution provisions in the above-described arrangements clearly survives the lower court's test. In many cases, they may not be "in writing" or "signed by the parties." Such results threaten the integrity of their dispute resolution mechanisms and thereby undercut an essential condition of international commercial exchanges, thwarting the very purpose of the New York Convention recognized in *Scherk* and *Mitsubishi*.

The lower court briefly appeared to recognize the ramifications of its decision in a curious footnote. *See* Pet. App. 16a n.1. After announcing its rule (requiring that that the arbitration agreement be "signed by the parties before the Court or their privities"), it explained that its decision did not disturb other circuit jurisprudence holding that the New York Convention applies to contracts signed by the parties' privities or incorporated by reference. *Id.* But saying does not make it so. Those contexts, just like the one here, involve efforts to enforce international arbitration agreements that have not been "signed by the parties." Notwithstanding the lower court's misgivings, the commercially disastrous implications of its decision illustrate the need for a different, more commercially flexible rule better attuned to the purposes of the New York Convention recognized in *Scherk* and *Mitsubishi*.

Some commentators have argued that the Convention was designed to advance an additional purpose—to supply a uniform substantive law governing international arbitration. *See* van den Berg, *Uniform Interpretation* at 1-2. According to this argument, Article II should be read to supply a minimum form for arbitration agreements—in writing and signed by the parties. It follows, this argument concludes, that the Convention displaces national law for agreements to be enforceable under Article II.

This argument is incorrect. Even as it builds upon the shortcomings of the Geneva treaties, the New York Convention continues to follow their design by relying extensively on the national law of signatory states. For example, the Convention expressly limits its reach to disputes "capable of settlement by arbitration" but nowhere identifies what disputes are arbitrable, effectively leaving that matter to signatory states. *See* Quigley, 70 Yale L.J., at 1063-64. Similarly, Article II (3) requires courts in signatory states to refer a dispute to arbitration unless the agreement is "null and void, inoperative or incapable of being performed." New York Convention Article II (3). Again, the Convention does not define those terms, leaving their interpretation to the courts of signatory states. *See* Quigley, 70 Yale L.J., at 1063-64. Several provisions, like Article V, link the enforceability of an arbitral award to a particular national law. For example, Article V (1)(a) ties the award's enforceability to the validity of the arbitration agreement and, to determine validity, requires application of either the law governing the arbitration agreement or the law of the arbitral forum. Thus, whatever role the New York Convention played in harmonizing the law governing international arbitration, it was not designed to displace national law governing certain issues, includ-

ing doctrines governing the identity of parties entitled to participate in an international arbitration.

4. The lower court's rule is inconsistent with the post-ratification understanding of other signatory states.

This Court routinely consults the post-ratification understanding of other signatory nations to inform its interpretation of an international treaty. *See Abbott*, 560 U.S. at 16; *Medellin*, 552 U.S. at 516; *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175-76 (1999); *Zicherman*, 516 U.S. at 226. In this case, the post-ratification understanding of the Convention establishes that other nations do not construe Article II to impose the inflexible straitjacket imposed by the court below. *See* 1 Born, *International Commercial Arbitration* § 5.02[A][1][e] at 670 (nothing that "a number of national courts" have interpreted Article II (2) not to "impose a minimum form requirement on Contracting States"). This is evident both from the statutory practices and judicial decisions of other signatory nations.

a. Statutory practice.

Many countries that have ratified the New York Convention also have specific statutes governing international arbitration. *See* 1 Born, *International Commercial Arbitration* § 1.04[B] at 126-27. Those international arbitration statutes, designed to comport with the New York Convention, define international arbitration agreements less rigidly than the court below.

States adopting the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") supply an informative example. First drafted in 1985 and substantially revised in 2006,

the UNCITRAL Model Law offers countries a code governing international arbitration that is specifically designed to complement the New York Convention's framework. *See generally* UNCITRAL Model Law, G.A. Res. 40/72, 40 U.N. G.A.O.R. Supp. (No. 17), U.N. Doc. A/40/17 (June 21, 1985), *revised in* 2006, G.A. Res. 61/33, U.N. Doc. A/61/33. Eighty nations (and several federated states), including seventy-nine signatories to the New York Convention, have adopted some form of the UNCITRAL Model Law. UNCITRAL, *Overview of the Status of UNCITRAL Conventions and Model Laws* (Sept. 5, 2019) *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/overview-status-table_2.pdf.

Both versions of the UNCITRAL Model Law (like the FAA) define the term "arbitration agreement," and the 2006 version specifically contains options for capaciously defining arbitration agreement not limited to written agreements formally signed by the parties. UNCITRAL Model Law art. 7. The widespread acceptance of the UNCITRAL Model Law among signatory states to the New York Convention reflects a widely-held belief, consistent with the above-described drafting history, *supra* at 18, that the Convention does not impose a minimum requirement on the form of arbitration agreements. Instead, it leaves to the signatory states the authority to adopt more flexible forms, tailored to the needs of international commerce.

Official statements by UNCITRAL, the drafter of the Model Law, re-enforce this interpretation. At the time it completed the 2006 revisions to the Model Law, UNCITRAL also adopted an "Interpretive Instrument" governing the New York Convention. *See Interpretive Instrument on the New York Convention in* A Guide

to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration 603-04 (Howard Holtzmann, et al., 2015). In relevant part, that Interpretive Instrument recommends that Article II of the New York Convention not be interpreted to impose an "exhaustive" form requirement on arbitration agreements but, instead, should be interpreted as setting forth an exemplary form, leaving to member States the authority to adopt less rigid rules. *Id.* at 605. That Interpretive Instrument offers especially compelling proof that the signatory states to the New York Convention did not intend the inflexible interpretation of Article II adopted by the court below. *See id*. at 608-09.

The statutory frameworks of other signatory nations not adopting the UNCITRAL Model Law buttress this view. France is especially illustrative. Like the United States, France has not adopted the UNCITRAL Model Law but, instead, developed its own freestanding international arbitration law. Like the above-described other signatory nations, France's international arbitration law does not impose a minimum form requirement on international arbitration agreements and employs a commercially flexible approach to the involvement of parties other than those that have formally signed an international contract containing an arbitration clause. *See* 1 Born, *International Commercial Arbitration* § 5.02[A][5][g] at 707-08 (French legislation); *id.* § 10.02[E] at 1444-55 (describing French "group of companies" doctrine developed specifically for the arbitration context).

b. Judicial Decisions

Consistent with their national arbitration legislation and true to the above-described purposes of the New York Convention, numerous signatory states

have enforced arbitration agreements in circumstances where one (or more) of the parties has not formally signed the agreement. *See generally* 1 Born, *International Commercial Arbitration* § 10.02 at 1418-84. For example, a 2003 decision by the Swiss Federal Tribunal held that Article II (2) of the New York Convention does not preclude extension of an arbitration agreement to non-signatories. Instead, according to the Swiss court, from the moment an arbitration clause exists, the lack of a signature does not bar "extension" of the agreement. *Judgment of 16 October 2003*, 22 ASA Bull. 364, 386 (2004). Similarly, courts in other countries have adopted the "group of contracts" doctrine whereunder a court decides "whether an arbitration clause present in one contract can be extended to related contracts, notwithstanding their formal independence." A. M. Steingruber, *Consent in International Arbitration* (2012) (describing the "group of contracts" cases and stating that "courts consider whether an arbitration clause present in one contract can be extended to related contracts, notwithstanding their formal independence"); *accord* P. Leboulanger, *Multi-Contract Arbitration*, 13 Journal Int'l Arb. 47 (1996) (discussing the group of contracts cases). And while courts in civil-law systems may not utilize concepts like estoppel to address fact patterns involving non-signatories, "civil law authorities have reached comparable results to those provided under most forms of estoppel by different avenues." 1 Born, International Commercial Arbitration § 10.02[K] at 1476-77. *See also* J.J. Sentner, *Who is Bound By Arbitration Agreements? Enforcement by and Against Non-Signatories*, 6 Bus. L. Int'l 55, 65 (2005) (noting that, while continental courts typically do not apply a doctrine denominated estoppel, "the same result is frequently achieved in European cases through the

application of the theories of good faith, ostensible authority or apparent mandate”).

To be sure, a review of signatory state practice reveals historical counterexamples. *See* P. Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 Int'l Lawyer 269, 278, 281 (1979). Such jurisprudence simply demonstrates that the New York Convention necessarily operates in tandem with national law (whether the FAA, the UNCITRAL Model Law or something else), giving rise to some variation among signatory states. While state practice will vary, *amicus* has located no country taking the extreme position adopted by the court below: reading the New York Convention to preclude enforcement of *any* arbitration agreement unless that arbitration agreement is in writing and “signed by the parties before the Court or their privities.” Put simply, that rule lies at the polar extreme of state practice and does not represent a correct construction of a treaty designed to promote international commercial arbitration.

* * *

In sum, faithful application of the tools governing treaty interpretation reveal that the *Carlisle* doctrine is not “in conflict” with the New York Convention.

B. The *Carlisle* doctrine is not “in conflict” with Chapter 2 of the Federal Arbitration Act.

As noted above, Section 208's residual application clause also requires that a provision of Chapter 1 not be “in conflict” with Chapter 2. The lower court identified no such conflict, and a straightforward application

of this Court's tools of statutory interpretation reveals none.

Begin with the text. Nothing in Chapter 2 expressly precludes application of the *Carlisle* doctrine or otherwise sets forth a different rule governing the participation in an international commercial arbitration of parties that have not formally signed a contract containing an arbitration clause.

Beyond text, the structure of Chapter 2 reveals that Congress sought to promote the enforcement of international commercial arbitration agreements, not to inhibit the framework that prevailed prior to the United States' accession. Section 202 offers the most obvious indication. The first sentence of Section 202 provides that the Convention applies to "[a]n arbitration agreement … arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement *described in section 2 of this title …* ." 9 U.S.C. § 202 (emphasis added). This express reference to Section 2 suggests that Congress believed its principles were compatible with Chapter 2. These presumably include doctrines enabling the participation of certain parties other than those that have formally signed the contract containing the arbitration clause.

Other aspects of Chapter 2's structure reveal Congress' purpose to enhance the enforceability of international commercial agreements falling under the Convention. For example:

- Cases are brought more easily in federal court: Section 203 authorizes federal subject matter jurisdiction in cases arising under the Convention whereas Chapter 1 of the FAA does not provide an independent basis for federal subject

matter jurisdiction. *Compare* 9 U.S.C. § 203, *with* 9 U.S.C. § 4. Similarly, Section 205 contains a generous removal provision, authorizing removal on the basis of a federal question in the petition for removal and at any time prior to trial, whereas Chapter 1 lacks such expansive removal provisions. *See* 9 U.S.C. § 205.

- District courts have more expansive equitable powers to compel arbitration: Section 206 authorizes federal courts to direct arbitration to be held in the forum specified in the agreement, including a foreign one, whereas Chapter 1 limits the federal court's equitable power to ordering arbitration only within its own district. *Compare* 9 U.S.C. § 206, *with* 9 U.S.C. § 4. *See, e.g.*, *National Iranian Oil Co.*, 817 F.2d at 326.
- Awards are more easily enforced: Section 207 establishes a three-year period for enforcing awards after they are made whereas Chapter 1 establishes a one-year period. *Compare* 9 U.S.C. § 207, *with* 9 U.S.C. § 9. *See, e.g.*, *Sanluis Devs. L.L.C. v. CCP Sanluis, L.L.C.*, 556 F. Supp. 2d 329 (S.D.N.Y. 2008).

The upshot of this structural comparison between Chapter 1 and Chapter 2 is that Congress intended for the "statutory policy of rapid and unobstructed enforcement of arbitration agreements," to apply with special force in the international setting. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). Section 208's residual application clause simply helped to ensure that the occasionally more restrictive provisions of Chapter 1 did not impede the enforcement of international commercial arbitration agreements or awards. It was never intended to choke the enforcement of such agreements falling under the

Convention or to render them less enforceable than their non-convention (or domestic) counterparts.

The sparse legislative history surrounding ratification of the Convention and enactment of the implementing legislation supports this view. The United States waited ten years to ratify the New York Convention and another two years to complete implementing legislation. These delays complicated efforts by American businesses to obtain enforcement of arbitration agreements and awards in other countries (especially those countries that had already acceded to the New York Convention and deposited a reciprocity reservation). In response, lawmakers sought to "serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to international arbitration." S. Rep. No. 91-702, at 3 (1970). *See also* H.R. Rep. No. 91-1181, at 2 (1970) ("In the committee's view, the provisions of [the implementing legislation] will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts."). Hearing testimony and floor statements likewise indicate that a core reason for the Convention's ratification and the enactment of implementing legislation was to harness "the beneficial effects it will produce for the foreign commerce of the United States." S. Rep. No. 91-702, at 3 (1970), at 6 (statement of Ambassador Richard D. Kearney, Office of the Legal Adviser). *See also* S. Exec. Rep. No. 90-10, at 5 (1968) (statement of Ambassador Richard D. Kearney, Office of the Legal Adviser) ("The [New York Convention] protects the American businessman by insuring that agreements to arbitrate and arbitral awards will be enforced in the other countries party to the convention."); 116 Cong. Rec. 22,732-33 (statement

of Rep. Fish) (noting that accession to the Convention would "foster[] international trade" and "contribute to our Nation's commercial life"). By contrast, nothing in this legislative history shows a congressional intent to upend the settled rules governing non-signatories.[5]

* * *

In sum, faithful application of the tools governing the interpretation of federal statutes reveal that the *Carlisle* doctrine is not "in conflict" with Chapter 2.

C. The Case Should Be Remanded for Further Proceedings.

Rejection of the lower court's categorical rule leaves open a second-order question: namely in a case arising under the New York Convention, what is the "relevant" law under the *Carlisle* doctrine. Courts (both in the United States and elsewhere) divide over the answer to this second-order question, and at least five answers are possible. First, some authorities, extending *Carlisle*,

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[5] A few snippets of legislative history raise the question whether the Convention "applies only in those cases where the persons involved have voluntarily accepted arbitration." S. Exec. Rep. No. 90-10, at 1. *See also* S. Rep. No. 91-702, at 6, 10 (statement of Ambassador Richard D. Kearney, Office of the Legal Adviser); 116 Cong. Rec. 22,732 (statement of Rep. Fish). Read in context, these statements simply assuage any concerns that the Convention could require arbitration absent any agreement whatsoever. They do not support the entirely different proposition that, in case of an existing agreement (as is the case here), Congress meant to displace doctrines governing the parties that may invoke it. If Congress had intended such a radical change to longstanding practice, surely there would have been some reference to it in the legislative history. In this case, there is none. *See Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark.").

apply state law to Chapter 2 cases. *See* Restatement U.S. Law of Int'l Comm. and Investor-State Arb. § 2-3 Reporters' Note e (2019) (collecting authorities). Second, other federal courts, viewing Convention cases as disputes arising under federal law, apply federal common law. *See* 1 Born, *International Commercial Arbitration* § 10.05[A] at 1495 n.463 (collecting cases). Third, drawing on Article V (1)(a) of the New York Convention, a court could apply the law applicable to the arbitration clause which, under the separability doctrine, "may be governed by a different law from the underlying contract." *Id.* § 4.02[A] at 477; *see also id.* § 10.05[C][1] at 1497-99. Fourth, barring an affirmative choice of law governing the arbitration clause, a court might apply the law of the arbitral forum, again drawing on Article V (1)(a). *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 292 n.43 (5th Cir. 2004). Finally, some foreign courts and arbitral tribunals apply international law or transnational law to determine whether an arbitration clause extends to a party that has not signed the agreement. *See* 1 Born, *International Commercial Arbitration*, § 10.05[A] at 1493-94 (collecting cases). *Amicus* takes no position on this second-order issue, and remand will allow further record development on both the choice-of-law question and the content of any potentially applicable law.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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